Filed 6/13/19 Murphy v. James A. Nelson, Co., Inc. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FRANCES MURPHY, Plaintiff and Appellant, v. JAMES A. NELSON, CO., INC., Defendant; CENTURY INDEMNITY COMPANY, Intervener and Respondent.	A151774 (San Francisco City & County Super. Ct. No. CGC-08-274695)

Plaintiff Frances Murphy (Murphy) challenges an order granting the motion of intervenor Century Indemnity Company (Century) to vacate the default and default judgment against its "potential" former insured, intervenor James A. Nelson, Co., Inc. (Nelson Co.). Murphy conceded in her reply brief that the recent opinion in *Mechling v. Asbestos Defendants* (2019) 29 Cal.App.5th 1241 (*Mechling*), filed after Murphy's opening brief, would be dispositive once final if we declined to decide the issue differently. Given that concession and that we agree with the conclusion in *Mechling*, we affirm the challenged order.

BACKGROUND

Murphy, the wife of decedent Cornelius Murphy, filed her second amended complaint[1] for wrongful death in 2009. The complaint named numerous defendants,

[1] Although Murphy's four children are also plaintiffs in the underlying action, only Murphy is identified as the appellant in the notice of appeal.

including Nelson Co., and alleged exposure to asbestos-containing products resulting in the death of Cornelius Murphy. Murphy served the second amended complaint on Nelson Co.'s designated agent for service of process in January 2012. About a year later, in February 2013, she requested entry of default against Nelson Co. Nearly a year after that, in January 2014, she procured a default judgment against Nelson Co. in the amount of $2,689,350.00.

Three years later, in March 2017, Century filed a motion to set aside the default and default judgment. Century's attorney filed a declaration in support of the motion which stated Century was "the potential insurer of James A. Nelson Co., Inc. . . . , a suspended corporation. [¶] . . . I am informed and believe that Century Indemnity issued a liability insurance policy(ies) to James A. Nelson. That policy appears to provide James A. Nelson with insurance for the asbestos claims filed against James A. Nelson in this case. [¶] . . . In late December 2016, my office was informed by Brayton Purcell [the law firm representing plaintiffs] that there were upwards of 70 known cases involving James A. Nelson. [¶] . . . My office conducted its own investigation of court dockets to identify James A. Nelson cases and whether there were default judgments taken in other California jurisdictions. [¶] . . . My office did not discover the default judgment in this case until after January 3, 2017."

Following a hearing, the court granted the motion based on its inherent, equitable power to set aside a default on the grounds of extrinsic mistake or fraud. The order indicated the motion "is granted as to Century Indemnity only. Century Indemnity is allowed to bring said motion. (See *Western Heritage Ins. Co. v. Superior Court* (2011) 199 Cal.App.4th 1196.) The default entered against defendant James A. Nelson Co., Inc. on February 19, 2013 and the default judgment entered against defendant James A. Nelson Co., Inc. on January 28, 2014 are set aside as to Century Indemnity only, including any and all of its potential liabilities and obligations that may have arisen due to the default judgment. . . . The default and default judgment against James A. Nelson Co. Inc. remain in place."

DISCUSSION

Plaintiff's principle contention on appeal is that Century did not make a sufficient evidentiary showing in support of its motion to vacate and thus failed to "prove [the] three essential requirements to obtain relief" the Supreme Court endorsed in *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982 (*Rappleyea*).

After the filing of the appellant's opening brief and the respondent's brief, our colleagues in Division Five issued their opinion in *Mechling.* That case involved consolidated appeals by plaintiffs in other asbestos cases (represented by the same law firm representing Murphy), in which the trial court granted motions by Fireman's Fund Insurance Company to vacate defaults and default judgments against its insured. Division Five affirmed the orders vacating the defaults and the default judgments. (*Mechling, supra*, 29 Cal.App.5th at p. 1244.)

The substance of the evidentiary showing in *Mechling* in support of the motions to vacate—the declaration of Fireman's Fund's attorney—was substantially the same as the showing made in the instant case via the declaration of Century's attorney. Indeed, Murphy concedes "*Mechling* has nearly identical facts."

The *Mechling* court observed: "A trial court has inherent power to vacate a default judgment on equitable grounds. (*Rappleyea* [, *supra,*] 8 Cal.4th [at p.] 981 . . .); *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 736 . . . (*Aldrich*).) 'One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.' (*Rappleyea*, at p. 981. . . .) '[E]xtrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present.' " (*Mechling, supra*, 29 Cal.App.5th at pp. 1245–1246.)

Mechling applied the three-part test set forth in *Rappleyea*. "To qualify for equitable relief based on extrinsic mistake, the defendant must demonstrate: (1) 'a

meritorious case'; (2) 'a satisfactory excuse for not presenting a defense to the original action'; and (3) 'diligence in seeking to set aside the default once the fraud [or mistake] had been discovered.' [Citations.] When 'a default judgment has been obtained, equitable relief may be given only in exceptional circumstances.' [Citation.] We review the order granting [a] motion to set aside the default and default judgment for abuse of discretion. [Citation.] The law 'favor[s] a hearing on the merits whenever possible, and . . . appellate courts are much more disposed to affirm an order which compels a trial on the merits than to allow a default judgment to stand.' " (*Mechling, supra,* 29 Cal.App.5th at p. 1246, italics omitted.)

Mechling concluded, "the court did not abuse its discretion by granting the motions to set aside the default judgments. Fireman's Fund established it had 'a meritorious case.' [Citation.] In this context, only a minimal showing is necessary. [Citation.] The moving party does not have to guarantee success, or 'demonstrate with certainty that a different result would obtain. . . . Rather, [it] must show facts indicating a sufficiently meritorious claim to entitle [it] to a fair adversary hearing.' [Citation.] Here, the facts are (1) plaintiffs' alleged asbestos exposure occurred decades ago; (2) neither Associated nor Fireman's Fund defended the lawsuits; and (3) plaintiffs obtained default judgments totaling several millions of dollars, with any unchallenged showing of damages and causation. A reasonable inference from these facts is plaintiffs' damages award would have been impacted had Fireman's Fund presented a defense and challenged plaintiffs' proof of causation and damages. (See *Olivera v. Grace* (1942) 19 Cal.2d 570 . . . [meritorious factor may be satisfied where party 'presents facts from which it can be ascertained that the [party] has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding'].)" (*Mechling, supra,* 29 Cal.App.5th at pp. 1246–1247.)

Applying the second *Rappleyea* factor, *Mechling* concluded Fireman's Fund had articulated a satisfactory excuse for not presenting a defense to the lawsuits. "Fireman's Fund was not a named party and was not served with the complaints or other relevant pleadings. In 2012, Fireman's Fund received notice of the Mechling and Greely lawsuits

and a demand for coverage. In a March 2012 letter, Fireman's Fund notified plaintiffs it 'searched all available records' and had 'not located any reference or policies of insurance issued to Associated.' Fireman's Fund invited plaintiffs to provide information showing Fireman's Fund issued insurance policies to Associated, but plaintiffs apparently did not respond. This letter—which was before the court—supports the conclusion that Fireman's Fund had a satisfactory excuse for not defending the Mechling and Greely lawsuits: it did not believe Associated was its insured." (*Mechling*, *supra*, 29 Cal.App.5th at p. 1248.)

Lastly, *Mechling* considered the third *Rappleyea* factor: whether "Fireman's Fund established diligence in 'seeking to set aside the default' judgments once they 'had been discovered.' [Citation.] As stated above, Fireman's Fund located insurance policies appearing to provide coverage for Associated after entry of the default judgments. In February 2016, Fireman's Fund retained counsel to defend claims made against Associated; five months later, Fireman's Fund moved to set aside the defaults and default judgments. Plaintiffs correctly observe Fireman's Fund did not provide the date when it learned of the defaults and default judgments, but the absence of this information did not preclude the trial court from granting relief. When evaluating a motion to set aside a default judgment on equitable grounds, the 'court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.' [Citation.] The trial court did so here, and we cannot conclude the grant of equitable relief was an abuse of discretion." (*Mechling*, *supra*, 29 Cal.App.5th at pp. 1248–1249.)

Plaintiff forthrightly concedes that *Mechling* is dispositive, assuming we follow it. "On December 11, 2018 Division Five of this Court issued its published opinion, modified on January 9, 2019, in *Mechling v. Asbestos Defendants* A150132 . . . and consolidated cases. A Petition for Review was filed in the California Supreme Court on January 22, 2019. *Mechling* has nearly identical facts with this matter, and if still good law when this matter comes up for argument and decision, and *Mechling* is not reconsidered by this Court, it will be dispositive, and the trial court's decision affirmed."

The Supreme Court denied review in *Mechling* on March 20, 2019. We agree with the analysis in *Mechling*, and reach the same conclusion—that the trial court did not abuse its discretion by granting Century's motion for equitable relief.[2]

DISPOSITION

The order is affirmed. Century is entitled to its costs on appeal.

[2] In light of our conclusion, we need not and do not reach the other issues raised by the parties.

_____
Banke, J.

We concur:

_____
Margulies, Acting P.J.

_____
Sanchez, J.

A151774, *Murphy v. Nelson Co. Inc.*